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14
15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17

18 CARLA GIESEN, an individual; and
19 BRYAN GIESEN, an individual,

20 Plaintiffs,

21 v.

22 U.S. BANCORP (f/k/a Downey
Savings and Loan), a Delaware
Corporation; U.S. CENTURY
23 MORTGAGE, INC., a California
Corporation; and DOES 1 through 10,
24 inclusive,

25 Defendants.

Case No. 09-cv-7122-GAF (SSx)

**U.S. BANK NATIONAL
ASSOCIATION, SUCCESSOR IN
INTEREST TO THE FEDERAL
DEPOSIT INSURANCE
CORPORATION AS RECEIVER
FOR DOWNEY SAVINGS AND
LOAN ASSOCIATION, F.A.'S
MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED
COMPLAINT FOR FAILURE TO
STATE A CLAIM**

Date: March 1, 2010
Time: 9:30 a.m.
Crtrm.: 740

Hon. Gary A. Feess

[Complaint Filed: July 27, 2009]

1 U.S. Bank National Association, Successor in Interest to the Federal Deposit
2 Insurance Corporation as Receiver for Downey Savings and Loan Association, F.A.
3 ("U.S. Bank") hereby submits its memorandum of points and authorities in support
4 of its motion to dismiss Plaintiffs' Second Amended Complaint ("SAC") for failure
5 to state a claim as follows:

6 **I.**

7 **INTRODUCTION**

8 Plaintiffs' SAC is as flawed as each of the versions that preceded it. Plaintiffs'
9 amendment has done nothing to remedy the deficiencies identified by U.S. Bank in
10 its motion to dismiss their First Amended Complaint. Thus, Plaintiffs' SAC should
11 be dismissed for the reasons outlined below.

12 The fundamental flaw with Plaintiff's first claim for relief, for rescission
13 pursuant to the Truth in Lending Act ("TILA"), is that Plaintiffs still have not
14 alleged facts demonstrating their present financial ability to tender the loan
15 proceeds. Plaintiffs allege only that they are "capable and willing to participate in a
16 modified tender arrangement with Defendant USB via either monthly or installment
17 payments." (SAC ¶ 18.) TILA rescission is not a device designed to provide a
18 borrower with what amounts to a loan modification on the pretense that the
19 borrower is satisfying his or her tender obligations under TILA and unsurprisingly,
20 courts throughout California have rejected this approach to "tender" under TILA.

21 Plaintiffs' failure to allege facts showing their present ability to tender the full
22 amount of the loan proceeds mandates dismissal of their TILA rescission claim.
23 Given the number of opportunities Plaintiffs have had to amend their complaint,
24 dismissal should be with prejudice.

25 Plaintiffs' second claim for relief also fails because it seeks a declaration
26 contrary to TILA tender law. In their second cause of action, Plaintiffs ask for a
27 declaration regarding the amount they must tender and the format of such tender.
28 Tender under TILA requires Plaintiffs to tender the loan proceeds less interest and

1 fees. Moreover, tender under TILA does not allow borrowers to make payments
2 over time. Because the amount and method of tender is set by law, Plaintiffs'
3 declaratory relief claim fails to state a claim and should be dismissed.

4 II.

5 LEGAL STANDARD

6 A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v.*
7 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule
8 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean*
9 *Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see Neitzke v. Williams*,
10 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on
11 the basis of a dispositive issue of law."). Alternatively, a complaint may be
12 dismissed where it presents a cognizable legal theory yet fails to plead essential
13 facts under that theory. *Robertson*, 749 F.2d at 534.

14 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume
15 the truth of all properly pled factual allegations and must construe them in the light
16 most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th
17 Cir. 2002), *cert denied*, 538 U.S. 921 (2003). While the allegations of the complaint
18 are generally accepted as true, the complaint must allege "enough facts to state a
19 claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.
20 Ct. 1955, 1974 (2007). "[A] plaintiff's obligation to provide 'grounds' of his
21 'entitlement to relief requires more than labels and conclusions, and a formulaic
22 recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (internal
23 quotation and citation omitted). "Nor does a complaint suffice if it tenders 'naked
24 assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 129 S.Ct.
25 1937, 1949 (2009).

26 Further, legal conclusions need not be taken as true merely because they are
27 cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177
28 (9th Cir. 1987); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

1 "Nor is the court required to accept as true allegations that are merely conclusory,
2 unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden*
3 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187 (9th
4 Cir. 2001). When ruling on a motion to dismiss, the court may consider the facts
5 alleged in the complaint, documents attached to the complaint, documents relied
6 upon but not attached to the complaint when authenticity is not contested, and
7 matters of which the court takes judicial notice. *Parrino v. FHP, Inc.*, 146 F.3d 699,
8 705-06 (9th Cir. 1998).

9 "To survive a motion to dismiss, a complaint must contain sufficient factual
10 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"
11 *Ashcroft v. Iqbal*, 129 S.Ct. at 1949. "A claim has facial plausibility when the
12 plaintiff pleads factual content that allows the court to draw the reasonable inference
13 that the defendant is liable for the misconduct alleged." *Id.* "The plausibility
14 standard is not akin to a 'probability requirement,' but it asks for more than a sheer
15 possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads
16 facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line
17 between possibility and plausibility of 'entitlement to relief.'" *Id.* "Rule 8 marks a
18 notable and generous departure from the hyper-technical, code-pleading regime of a
19 prior era, but it does not unlock the doors of discovery for a plaintiff armed with
20 nothing more than conclusions." *Id.* at 1950 (emphasis added).

1 **III.**

2 **DISCUSSION**

3 A. Plaintiffs' TILA Rescission Claim Must Be Dismissed For Their Failure To
 4 Allege Facts Demonstrating Their Ability To Tender The Loan Proceeds.

5 Plaintiffs' claim that U.S. Bank violated TILA by allegedly failing to properly
 6 disclose the negative amortization features of their loan. (SAC ¶ 17.) Based upon
 7 this violation, Plaintiffs purport to have cancelled their loan via a July 24, 2009
 8 letter sent by their attorney to U.S. Bank. (SAC ¶ 13.)

9 To obtain rescission pursuant to TILA, "an obligor shall tender the property to
 10 the creditor." 15 U.S.C. § 1635(b). That is, "prior to ordering rescission based on a
 11 lender's alleged TILA violations, a court may require borrowers to prove ability to
 12 repay loan proceeds." *Garza v. American Home Mortgage*, 2009 WL 188604 at *4,
 13 (E.D. Cal., Jan. 27, 2009) (granting motion to dismiss where the complaint failed to
 14 sufficiently allege facts demonstrating the plaintiff's ability to repay the loan
 15 proceeds). "[R]escission should be conditioned on repayment of the amounts
 16 advanced by the lender." *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th
 17 Cir. 2003); *see LaGrone v. Johnson*, 534 F.2d 1360, 1362 (9th Cir. 1976) ("[T]he
 18 district court erred in not conditioning rescission on the tender of the net amounts
 19 advanced by the [lender]."). If the borrowers are "unable to tender the loan
 20 proceeds, the remedy of unconditional rescission [is] inappropriate." *American*
 21 *Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007).

22 Plaintiffs do not allege that they have tendered the remaining loan proceeds,
 23 nor do they provide any facts to support their conclusory allegation that they have
 24 the ability to do so. The best they do is plead that, "Plaintiffs . . . have the ability to
 25 tender the proceeds given to them by Defendant USB in accordance with applicable
 26 statutes and case law. Plaintiffs are both capable and willing to participate in a
 27 modified tender arrangement with Defendant USB via either monthly or installment
 28

1 payments." (SAC ¶ 18.) The law is clear that this allegation regarding Plaintiffs'
2 ability to tender is insufficient.

3 California district courts have rejected borrowers' attempts to use TILA
4 rescission as a means to obtain a loan modification. *See Kamp v. Aurora Loan*
5 *Services*, 2009 WL 3177636, *2 (C.D. Cal., Oct. 1, 2009) (rejecting the plaintiff's
6 "tender" offer to make monthly payments on modified loan terms as "insufficient for
7 purposes of rescission" under TILA, and dismissing the plaintiff's TILA claim for
8 failing "to allege that they can or will tender the borrowed funds back to the lender"
9 in one lump amount); *Kratz v. Countrywide Bank*, 2009 WL 3063077, *6 (C.D. Cal.,
10 Sept. 21, 2009) ("Plaintiffs may not demand TILA rescission while also asking this
11 Court for some alternative, so-called 'equitable' remedy . . ." that would result in
12 payments over time on more favorable terms). As the Court in *Nichols v.*
13 *Greenpoint Mort. Funding Inc.*, 2008 WL 3891126, *5 (C.D. Cal., Aug. 19, 2008)
14 noted "[r]escission is not a means to create highly favorable loan terms for the party
15 seeking rescission. Instead, it is a means to return the parties to the *status quo ante*,
16 as if the loan never existed." *Id.* (emphasis supplied). Plaintiffs' allegation that they
17 are capable of tendering the loan proceeds over a period of time is thus insufficient
18 as a matter of law to plead their ability to tender.

19 Dismissal with prejudice of Plaintiffs' TILA rescission claim is appropriate at
20 this point. Plaintiffs still have not sufficiently alleged tender, despite having filed
21 three different complaints. Plaintiffs have had enough opportunities to fix their
22 defective pleading and U.S. Bank requests that the Court dismiss their rescission
23 claim with prejudice.

24 B. Plaintiffs' Declaratory Relief Claim Should Be Dismissed.

25 Plaintiffs' declaratory relief claim seeks a declaration regarding the amount
26 Plaintiffs must tender and the specific format by which they must do so. As
27 discussed above, to effect rescission, Plaintiffs must tender the loan proceeds they
28 received less any fees or interest they paid to U.S. Bank over the life of the loan.

1 Moreover, they may not make this tender in installments or on a monthly basis as
2 they have requested. Because the law regarding tender is clear, the Court should
3 dismiss Plaintiffs' declaratory relief claim.

4 **IV.**

5 **CONCLUSION**

6 For the foregoing reasons, U.S. Bank respectfully requests that the Court
7 grant its motion to dismiss Plaintiffs' SAC in its entirety.

8 Dated: February 3, 2010 SHEPPARD MULLIN RICHTER & HAMPTON LLP

9 By /s/ J. Barrett Marum
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